In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-896

STEVEN A. LOZOFF, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

On March 22, 1971, in the United States District Court for the District of Massachusetts, petitioner pleaded guilty to two counts of sale of 3300 tablets of LSD, in violation of 21 U.S.C. (Supp. V) 331(q)(2). On April 5, 1971, petitioner was sentenced to concurrent prison terms of two years on one count and five years on the other. On August 3, 1971, the court denied a motion for reduction of sentence. The court of appeals affirmed this denial *per curiam* on December 9, 1971 (Pet. App. 4a-5a). The petition for a writ of certiorari was filed on January 10, 1972, and is therefore out of time under Rule 22(2) of the Rules of this Court.

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On April 5, 1971, the court held a sentencing hearing. The United States Attorney's office recommended that petitioner be given consecutive terms of two and five years. The prosecutor stated that consecutive sentences were being recommended because of petitioner's role in the narcotics scheme (Tr. 3–5).

The defense then called psychiatrists, Dr. Margaret Goldman and Dr. William L. Lorton. Dr. Goldman testified that petitioner had been her patient from June 22, 1969, until November 1970, when she recommended that he enter the Milwaukee Psychiatric Hospital because outpatient treatment was insufficient. Dr. Goldman related that petitioner had been subjected to a disruptive home life in which his mother had been hospitalized for thirteen months after an attempted suicide, and had emotional problems manifested in fits of depression, extreme anxiety, and compulsive overeating (Tr. 9–14). Dr. Goldman concluded that although she was unfamiliar with the type of psychiatric care available in a penal institution, she believed that petitioner needed intensive psychotherapy which would not be possible in that surrounding (Tr. 14–15).

Dr. Lorton, a staff psychiatrist and Director of the Outpatient Department of the Milwaukee Psychiatric Hospital, testified that petitioner was in need of a structured environment such as the hospital offered in order to cope with his anxieties and depressions (Tr. 15–19). Dr. Lorton also stated that the bulk of psychiatric treatment in penal institutions is group therapy and that, although this would be helpful, it would not be sufficient (Tr. 19–20).

The court sentenced petitioner to concurrent sentences of two and five years (Tr. 32). In explaining its reasoning for the sentence, the court stated that considerations of rehabilitation of petitioner were "subsidiary" (Pet. App. 1a) to deterrence of others involved in narcotics traffic. The court emphasized that petitioner had engaged in "a persistent course of conduct" involving more than a few sales of thousands of LSD pills and that since this conduct was deliberate and practiced "by intelligent people," it was of extreme importance to deter others from perpetrating this harm on themselves and others. The court also noted that penal institutions do offer some psychiatric treatment which would be available to petitioner. (Pet. App. 2a).

Petitioner claims that his sentence violated due process because it was based exclusively on considerations of deterrence. As the court of appeals stated, "defendant of course exaggerates when he argues that the Court considered only the factor of deterrence" (Pet. App. 5a). In discussing the basis for its sentence, the district court reviewed petitioner's role as a wholesaler of unlawful drugs, the opportunity to continue his psychiatric treatment in a penal institution, and the detrimental effects inherent in any incarceration. The general deterrent effect of incarceration is a legitimate consideration in imposing sentence. A trial judge has wide discretion in determining what sentence to impose and that discretion was not abused here. See *Gore* v. *United States*, 357 U.S. 386, 393.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

MARCH 1972.

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